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In The

Supreme Court of the United States

October Term, 1979

No. 79-1640

BOROUGH OF MOUNT EPHRAIM,

Respondent,

vs.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Appellants/ Petitioners.

APPEAL FROM SUPREME COURT OF NEW JERSEY ON JURISDICTIONAL STATEMENT

and

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF NEW JERSEY

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 13(2) and 15 of the Rules of the Supreme Court of the United States, appellants James F. Schad, 613 Corporation and Juliette Ann Di Luciano, file this statement of the basis upon which it is contended that the Supreme Court of the United States had jurisdiction to review the order entered by the New Jersey Supreme Court in this case and should exercise such jurisdiction herein. Alternatively, James F. Schad, 613

Corporation and Juliette Ann Di Luciano, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above-entitled case on January 18, 1980.

OPINIONS BELOW

The defendants, charged in the Borough of Mount Ephraim Municipal Court with a use of the premises of 613 Corporation for live nude dancing in violation of the Borough's Zoning Ordinance 99-15B (which purports to proscribe all forms of live entertainment throughout the Borough) objected that the ordinance was constitutionally infirm for a number of reasons. The defendants contended that the ordinance worked an impermissible prior restraint on and suppression of freedom of expression guaranteed by the First and Fourteenth Amendments to the United States Constitution. In addition, the defendants contended that the ordinance, in its application, was not rationally related to the legitimate objectives of zoning, that it was arbitrary and discriminatory, that it lacked clarity, and that it was overbroad and it, thereby, offended the due process and equal protection guarantees of the Fourteenth Amendment to the United States Constitution. The defendants' contentions notwithstanding, they were convicted by the municipal court. The Camden County Court, trying the defendants *de novo* on the record made in the municipal court determined that the zoning ordinance was a reasonable exercise of the police power and that it was not directed to any infringement on the constitutionally protected rights of the defendants. Accordingly, the Camden County Court similarly found the defendants guilty. The Superior Court of New Jersey, Appellate Division, affirmed the judgment of the Camden County Court essentially for the reasons expressed by it in its opinion.

JURISDICTION

On January 18, 1980, the Supreme Court of New Jersey entered separate orders dismissing the defendant's appeal from and denying their petition for certification to the Superior Court of New Jersey, Appellate Division.

The Supreme Court of the United States has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1257(2).

The Supreme Court of the United States has jurisdiction to review the final judgment on a petition for certiorari pursuant to 28 U.S.C. §1257(3).

Decisions thought to sustain jurisdiction include *Fiske v. Kansas,* 274 U.S. 380 (1927) and *Torcaso v. Watkins,* 367 U.S. 488 (1961).

ORDINANCES AND CONSTITUTIONAL PROVISIONS INVOLVED

Borough of Mount Ephraim Zoning Ordinance 99-15B provides:

> "B. Principal permitted uses on the land and in buildings.
>
> (1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may,

in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty percent (20%) of the gross floor area of the stores.

(2) Motels."

Borough of Mount Ephraim Zoning Ordinance 99-4 provides:

"§99-4. Prohibited uses.

All uses not expressly permitted in this chapter are prohibited."

First Amendment to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the Constitution of the United States:

"Section I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

Whether a municipality may, without violation of the defendants' federal constitutional guarantees of free speech and expression, due process and equal protection, impose criminal penalties for the violation of its zoning ordinance which ordinance purports to proscribe all forms of live entertainment within the municipality's boundaries.

STATEMENT OF THE CASE

A. Statement of the Facts

The essential facts are simply stated. In June of 1973, the defendants opened for business in a commercial zone in the Borough of Mount Ephraim, offering for sale, at retail, various books, magazines and films. Shortly after its commencement of business, 613 Corporation obtained amusement licenses for the operation of a number of coin-operated devices. Each of the devices consisted of a booth in which a film is shown upon the patron's insertion of a coin. In July of 1976, the defendants commenced to offer an additional form of amusement. That second form of amusement consisted of a booth with an opaque glass panel. Upon the patron's insertion of a coin, the panel became clear which enabled the patron to view a dancer — usually nude — performing beyond the glass. It is the Borough's contention that the defendants' conduct, in offering that second form of amusement, violated its zoning laws and made them subject to criminal penalties.

B. Procedural History

This action began with complaints by the Borough of Mount Ephraim charging James F. Schad, 613 Corporation and Juliette Ann Di Luciano with the use of the premises of 613 Corporation for a use contrary to the provisions of Borough of Mount Ephraim Zoning Ordinance 99-15B. In that proceeding, the defendants filed a brief in support of their motion to dismiss the complaints. In their brief, the defendants argued that the

Borough's interpretation of its ordinance and the application of the ordinance to them violated the defendants' rights secured by the First and Fourteenth Amendments to the United States Constitution. Specifically, the defendants contended that the activity to which the Borough objected — live nude dancing — was expression presumptively protected by the First Amendment. Further, the defendants contended that the Borough's ordinance (which the Borough interpreted to proscribe live entertainment throughout its boundaries) attempted to suppress rather than regulate presumptively protected expression and that the ordinance was unduly vague and overly broad. The brief further contended that the ordinance offended the requirements of due process and equal protection in that, in its application to the defendants, it was unreasonable and arbitrary. The municipal court specifically determined that the defendants' activity was not protected by the First Amendment and impliedly determined the balance of the issues raised by the defendants against them in its decision on June 2, 1978. Each of the defendants were found guilty and sentenced to pay a fine of $300.

The defendants filed a timely notice of appeal with the Camden County Court on June 13, 1978. A trial *de novo* was had on the record made in the municipal court to include the briefs filed with that court. The Camden County Court determined that, although live nude dancing is protected by the First Amendment ". . . First Amendment guarantees are not involved in this matter." It further determined that ". . . there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights." Impliedly rejecting the balance of the defendants' contentions, the Camden County Court found each of them guilty as charged and sentenced each of them to pay a fine together with costs. An order to that effect was entered on November 3, 1978.

On November 24, 1978, the defendants filed their notice of appeal from their conviction in the Camden County Court with the Superior Court of New Jersey, Appellate Division. On appeal, the defendants contended that their convictions were violative of their First and Fourteenth Amendment guarantees. The Appellate Division affirmed the defendants' convictions on October 17, 1979 for the reasons expressed by the Camden County Court.

On November 5, 1979, the defendants filed both a notice of appeal for certification and a notice of appeal to the Supreme Court of New Jersey. The defendants sought review on grounds which included their contention that their convictions were violative of the First and Fourteenth Amendment guarantees. On January 18, 1980, the New Jersey Supreme Court entered an order denying the defendants' petition for certification and dismissing their appeal.

SUBSTANTIALITY OF FEDERAL QUESTIONS OR, ALTERNATIVELY, REASONS FOR GRANTING THE WRIT

The speech protected by the First Amendment to the United States Constitution is not, of course, limited to the written or spoken word. Live performances and dance are afforded broad prima facie protection. *See, e.g., Schact v. United States,* 398 U.S. 58 (1970). Even barroom-type nude dancing is presumptively entitled to the protection of the First Amendment. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50 (1976); *Doram v. Salem Inn, Inc.,* 422 U.S. 922 (1975); *California v. LaRue,* 409 U.S. 109 (1972). Any attempt to restrict the exercise of First Amendment liberties must be justified by clear public interest. The rational connection which in some other context might support legislation against attack on due process grounds, will not suffice here. *Thomas v. Collins,* 323 U.S. 516 (1945), *reh. den.,* 323 U.S. 819 (1945). Accordingly, governmental regulation which limits First Amendment freedoms is justified only if the regulation is within the constitutional power of the government; if it furthers an

important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien,* 391 U.S. 367 at 377 (1968). *See also, Young v. American Mini Theatres, Inc.,* 427 U.S. 50 at 81 (1976). Even if the governmental purpose of the regulation is shown to be appropriately legitimate and substantial, the regulation cannot be sustained on attack if that regulation employs means that "broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Keyishian v. Board of Regents of U. of St. of N.Y.,* 385 U.S. 589 at 601 (1967).

The Borough, of course, is constitutionally empowered to enact zoning ordinances. However, the Borough has not attempted to identify the interest which is served by its blanket ban on live entertainment. Certainly, it has not attempted to establish that that interest, whatever it may be, is a compelling substantial, subordinating, paramount, cogent or strong interest. As opposed to the Borough's ordinance being unrelated to the suppression of free expression, suppression seems to be its only effect. Instead of embodying narrowly drawn standards closely related to the unidentified interest, the Borough's regulation blindly swings a heavy club knocking down everything in its path.

Further, governmental regulation must be accomplished by methods consistent with due process. The guarantee of due process demands that a regulation be based upon some factor having a proper relation to the purpose of the control. Due process and equal protection further require that classifications made by the regulating body will not be unreasonable, arbitrary or capricious. *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522 (1959). New Jersey's law is clearly in accord. *Rockhill v. Chesterfield Township,* 23 N.J. 117 (1957); *Schmidt v. Board of Adjustment of City of Newark,* 9 N.J. 405 (1952). The maintenance of coin-operated amusement devices, each of which consists of a booth in which a short sexually-explicit film is

shown upon the patron's insertion of a coin, is a permitted use of the defendants' property. The second form of amusement sought to be introduced by the defendants likewise consists of a booth and is activated by the patron's insertion of a coin. Rather than causing a film to be projected on a screen, the insertion of the coin, in the second form of amusement, causes an opaque glass panel to become clear enabling the patron to view a usually nude dancer beyond the glass. The Borough has taken the position, and the New Jersey courts have sustained the Borough's position, that the second form of amusement is a use which is neither permitted nor accessory to the principal use. The first and second forms of amusement are so similar in their operation and character to be, for the purposes of zoning, indistinguishable. There is nothing about the second which is, in the least, any more inimical to the purposes of the Borough's zoning ordinance than the first. The Borough, in interpreting its zoning ordinance, has sought to exclude a use so similar to a permitted use that the two uses are in effect indistinguishable. The exclusion is patently discriminatory and arbitrary and offensive to the guarantees of due process and equal protection.

The vagueness, overbreadth and oppressive effect on First Amendment freedoms of the Borough's zoning regulation are abundantly clear. Just as clear, is the arbitrariness of the Borough's application of its ordinance to the conduct of the defendants which led to their prosecution. The invalidity of the ordinance and the impropriety of its application to the defendants are patent. This Court should review the convictions of the defendants in order to forestall the proliferation of the practice by municipalities of utilizing loose interpretations of zoning ordinances to effectively suppress expression protected by the First Amendment. It is respectfully submitted that this Court should further review the convictions of the defendants in order to vindicate their rights secured by the Federal Constitution but denied to them by the judgment below.

CONCLUSION

For the foregoing reasons and based upon the foregoing authorities, the defendants submit that this Court should take jurisdiction of this appeal, or, alternatively, pray that a writ of certiorari issue from this Honorable Court to review the judgment of the Supreme Court of New Jersey. In the event that jurisdiction is accepted or that the petition is granted, defendants pray that the zoning ordinances of the Borough of Mount Ephraim, as applied to them, be declared constitutionally invalid and that their convictions be reversed.

Respectfully submitted,

s/ Robert E. Levy

LEVY AND ROBERTSON
Attorneys for Appellants/ Petitioners

APPENDIX

OPINION OF CAMDEN COUNTY COURT

CAMDEN COUNTY COURT
CRIMINAL
ON APPEAL 123-77

BOROUGH OF MOUNT EPHRAIM,

Plaintiff

VERSUS

JAMES F. SCHAD, DENNIS C. FAVEN,

SIX THIRTEEN CORPORATION, JULIETE ANN DI LUCIANO,

Defendants

September 21, 1978

BEFORE: HONORABLE NEIL F. DEIGHAN, JR., J.C.C.
CAMDEN COUNTY COURTHOUSE

APPEARANCES: ARNOLD N. FISHMAN, ESQUIRE

ROBERT E. LEVY, ESQUIRE

Reported by:

JEAN M. PETRUZZI, C.S.R.

THE COURT: Gentlemen, this is an appeal from four complaints of the Borough of Mount Ephraim Municipal Court. 392 is against the defendant, Faven for violation of an

ordinance, ordinance number 99-2.J concerning the painting of a sign by that defendant. Complaint 391 against the defendant James F. Schad was dismissed. But as against Faven, he was found guilty and ordered to pay a fine of seventy-five dollars. Complaint 393, 394, and 395 are against the defendants, Six Thirteen Corporation, James F. Schad, and Juliete Ann DiLuciano, all of whom are charged respectively with using the premises at Six Thirteen Black Horse Pike, Mount Ephraim, New Jersey for live nude dancing. On complaints 393, 394, and 395, the respective defendants were found guilty of violation of zoning ordinance 99-15B and a fine of three hundred dollars was imposed against each of the defendants.

The matter was initally tried before the Municipal Court of the Borough of Mount Ephraim on a stipulation of facts as follows:

1. Defendant opened for business at its present location in a C Zone in the Borough of Mount Ephraim in June, 1973.

2. From its inception, defendant exposed for sale adult books, magazines and paraphenalia as well as having coin-operated movie peep shows.

3. In July, 1976, defendant commenced offering live nude dancing.

5. Also, in July, 1976, defendant obliterated the legend from its existing non-conforming sign without obtaining a permit.

6. The Judge will view the defendant's activities in question of the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.

It was also stipulated that the following issues were to be decided by the Municipal Court.

Opinion of Camden County Court

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone?

2. Is defendants' live nude dancing protected by the First Amendment?

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

4. May defendant place a new Legend upon its obliterated non-conforming sign advertising live nude dancing?

5. Must the defendant secure a permit to repaint the sign with a new legend?

6. May the defendant replace the old legend from its obliterated non-conforming sign?

7. Must the defendant secure a permit to return the old legend?

At the hearing additional testimony was taken of Albert Tovinsky, the Building Inspector; and the Chief of Police, Joseph Graham. He was requested to produce excerpts of the Zoning Ordinance of the Borough of Mount Ephraim which had been amended in 1973.

The Building Inspector was only familiar with the recent Zoning Ordinance, having taken office in 1974.

He said there were no prior records concerning Zoning Ordinances. He said that the Zones are essentially single family, residential, single family townhouse garden apartments and commercial. He said that the Zoning Ordinance does not allow adult and an adult motion picture theater, nor does it provide for a dance hall, pool room, billiard parlor or bowling allies.

Opinion of Camden County Court

Apparently the defendant was attempting to establish selective enforcement of the Ordinance and much of the transcript of the hearing is concerned with colloquy between counsel and the court. At any rate, it was established that a place called Capriotti's is in the commercial Zone C. The Building Inspector knew nothing about six amusement licenses issued to Capriotti's, the Mount Ephraim Democrat Club, Spread Eagle Inn, but admitted that the Zoning Ordinance does not provide for amusement or entertainment. The Mount Ephraim Democratic Club, the Spread Eagle Inn, and an establishment known as Guiseppi's are all located in the commercial zone and he did not know whether the Borough issues entertainment licenses. He heard of an establishment called My Dad's, which is located in the commercial zone and again, had no knowledge concerning licenses, although he said that they do have live entertainment which is not permitted under the Zoning Ordinance. He said that they had live entertainment from the late or early fifties and that another establishment known as Al-Jo's has live entertainment, and is in Zone C, but goes back to the same period of time. He said that non-conforming uses are permitted under the ordinance and indicated that these were non-conforming uses in so far as live entertainment is concerned. He said he was informed that non-conforming uses would be permitted to continue. He testified that music was the entertainment offered at My Dad's and they some times have vocalists, and that there was a band at Al-Jo's.

He also said that he had no knowledge of anyone having action taken against him for providing amusement or entertainment in the Borough of Mount Ephraim. He said that Bingo is offered in the Borough. And apparently the contention was that Bingo is live entertainment. But, at any rate, the witness Tovinsky, had no knowledge concerning the operation and establishment of Bingo. And admitted that he was familiar with permitted uses of C Zone. He issued the complaint concerning nude dancing after consultation with the Police Chief, Graham, the Borough Commissioners and the Borough Solicitor. He said

that the Building Inspector's office had no prior records concerning the Zoning Ordinances. He said that Six Thirteen Corporation has a license to operate peep shows and that the present complaint was not directed towards the peep shows. All of the other business establishments were doing business as far back as 1957, as far as he could remember.

On behalf of the defendant, Police Chief Joseph Graham testified that My Dad's, Club Al-Jo, and Capriotti's and Six Thirteen Corporation are the only ones that have live entertainment within the Borough. He said that the three establishments other than Six Thirteen had live entertainment since 1948.

As to the violation concerning the sign, the defendant points out that the Borough of Mount Ephraim adopted in 1970 the BOCA basic building code and further that pursuant to article 14 of that code repainting or reposting a display matter shall not be deemed an alteration. The Municipality contends that by painting over the old legend it is an indication of an intentional abandonment. It is also contended that this required information of the Municipality and also the permission to repaint the sign.

It is the finding of this Court that the changing of the legend on the existing sign is in no way an abandonment by the defendant of any non-conforming use of the sign. Further, it would appear that as to the repainting of the sign does not require a new permit or license. The purpose of repainting of the sign was to advertise nude entertainment.

It is the opinion of the Court that the defendants had the right to repaint the sign but that if the advertising was false, it is of no concern in this matter. Therefore, the finding of the defendant Faven guilty of violating section 99-26J of the Zoning Ordinance is reversed. And it is the determination that the defendant is not guilty of this ordinance. And the fine, if paid, shall be returned to the defendant.

More specifically to answer the issues stipulated the Court finds as follows:

4. May defendant place a new legend upon its obliterated non-conforming sign advertising live nude dancing? Yes.

5. Must defendant secure a permit to repaint the sign with a new legend? No.

6. May defendant replace the old legend from its obliterated non-conforming sign? Yes.

7. Must defendant secure a permit to return the old legend? No.

There remains the first three questions concerning live nude dancing and enforcement of the Zoning Ordinances. These three questions, together with the answers are as follows:

1. Is live entertainment permitted under the Zoning Ordinances of the Borough of Mount Ephraim in a C Zone? No.

2. Is defendants' live nude dancing protected by the First Amendment? Yes, but not in this case.

3. Has the Borough of Mount Ephraim engaged in selective enforcement of its Zoning Ordinances?

No, As to the third question, there simply has not been set forth any factual basis to prove that the Municipality is engaged in selective enforcement of its ordinance.

The defendants under point 3 of their memorandum set forth law on selectivity and gives discriminatory application of the local ordinance.

There are no facts before the Court to indicate selectivity or discriminatory enforcement. And therefore there is no question

to be resolved concerning the Constitutional aspects of the Equal Protection Clause as argued by the defendants.

There has been testimony concerning Capriotti's, Mount Ephraim Democratic Club, the Spread Eagle Inn, Guiseppi's, My Dad's, and Al-Jo, but it would appear from the testimony that any live entertainment in these establishments would be a non-conforming use under the Zoning Ordinance. Therefore, there is no proof of any selectivity or discriminatory conduct by the Borough.

Section 99-15 of the Zoning Ordinance of the Borough of Mount Ephraim deals with Class C commercial districts and subsection A from the record below and subsection B from the record below as to commercial districts provides as follows:

> "B. Principal permitted uses on the land and in buildings.
>
> (1) Offices and banks; taverns; restaurants and luncheonettes for sit-down dinners only and with no drive-in facilities; automobile sales; retail stores, such as but not limited to food, wearing apparel, millinery, fabrics, hardware, lumber, jewelry, paint, wallpaper, appliances, flowers, gifts, books, stationery, pharmacy, liquors, cleaners, novelties, hobbies and toys; repair shops for shoes, jewels, clothes and appliances; barbershops and beauty salons; cleaners and laundries; pet stores; and nurseries. Offices may, in addition, be permitted to a group of four (4) stores or more without additional parking, provided the offices do not exceed the equivalent of twenty per cent (20%) of the gross floor area of the stores."

It is apparent from reading the permitted uses that live entertainment whether it be nude or otherwise, is not permitted.

Opinion of Camden County Court

As has been heretofore stated, live entertainment in other establishments constitute non-conforming uses.

The violations concerned in this matter occurred on July 21, 1976 and the defendant, Six Thirteen Corporation opened for business at its present location in a C commercial district in June, 1973, and since that date has engaged in the sale of adult books and magazines and other articles as well as coin-operated peep shows. The present Zoning Ordinance was adopted in 1973. Therefore, Six-Thirteen Corporation could not acquire a prior non-conforming use.

The defendants contend that live nude dancing is protected by the First Amendment. The Municipal Court held that live nude dancing is not protected under the First Amendment citing the cases of Portland v. Derrington and Schneider v. State.

This Court has held that live nude dancing is protected by the First Amendment but it is the opinion of this Court that the First Amendment guarantees are not involved in this matter. In the Case of Adams Newark Theater Company versus Newark, 22 NJ472 1956, the Supreme Court of New Jersey recognized that the presentation of moving pictures and stage shows come within the protective ambit of the constitutional right of free speech. Adams involved the legality of certain ordinances condemning lewdness, obscenity or indecency. The Supreme Court went on to recognize however, that this liberty was not absolute.

It states, "recent decisions make it plain that the presentation of moving pictures and stage shows definitely comes within the protective ambit of constitutional free speech. While this liberty is extensive and is usually ardently defended by the courts, it is by no means absolute. Inroads and restrictions are permitted under the aegis of the police power of the states, which may be delegated to subordinate governmental bodies." 22 N.J. at 475. The limitation which the Court places on the conduct is that it may not be obscene. Adams at 476.

The Federal courts have also directed attention to nude dancing as an aspect of the first amendment within a variety of factual situations. California v. LaRue, 409 U.S. 109 34 Ed. 2d 342, 93 Supreme Court 390 (1972) presents the interrelationship of the First and Twenty-first amendments. In LaRue the California Dept. of Alcholic Beverage Control passed regulations prohibiting nudity in licensed bars. The regulations survived a First Amendment attack.

The subject matter as contended by the Defendant is annotated in 49 ALR 3d 1084 "Nude entertainment as a public offense." Without exception the cases in the annotation have arisen in context with obscenity law violations or related infractions, rather than within a Zoning Law context. The present case does not involve any law or ordinance regulating or restricting obscenity or nude dancing as such and is not involved with any moral issue. The present case is involved solely with whether nude dancing is a permitted use under the Zoning Ordinance. And the answer to this is obviously "No". Therefore, the conduct of nude dancing would violate the Zoning Ordinance.

The defendants attempt to relate this Zoning Ordinance violation to a Constitutionally protected right. Point III of the brief deals with restraining the Municipality from selective and discriminatory application of the ordinance. It has heretofore been determined that there are no facts to support a context of selectivity and discriminatory application of the Zoning Ordinance. Aside from this which this matter involves a quasi-criminal proceeding it is not a Chancery proceeding to restrain the Municipality from enforcing its Ordinance.

Under point IV the defendants content that their prior undisturbed use of the premises denotes a compliance with all Municipal Ordinances. While this may be so, it does not give them the privilege to conduct live entertainment in violation of the Ordinance. Under point V the defendants contend that the Municipality has drawn a distinction without reason. Under

point VII they contend that the exercise of police power must be reasonable and must have some relation to the purpose of the control under point VIII they contend that Zoning Ordinances may not be used for supression of First Amendment material. Under point IX they contend that the Zoning Ordinance is Constitutionally invalid, in that it prohibits communicative material in all zones.

In a supplemental brief the defendants contend that the Borough has failed to establish that other enterprises offering live entertainment constitute non-conforming uses. In this respect, the undisputed facts are that in the other establishments having live entertainment, the live entertainment anteceded the 1973 Zoning Ordinance by many many years. In a supplemental letter memorandum the defendants contend that live entertainment is an accessory use to the present permitted uses. This contention is based upon a determination by the Municipal Court that Municipal groups in restaurants and taverns is an accessory function to the tavern or restaurant but that live nude dancing is not an accessory use to a book store or even an adult bookstore.

This Court makes no determination concerning accessory uses but it should be pointed out that in addition to a finding that the use is incidental to the main use, it must also be found that the use must be a customary use.

Penn State versus PT&L Construction Company, Inc., 77 N.J. 20 (1978) and there is no proof of a custom.

There's no question but a Municipality may enact ordinances and Zoning Ordinances under the Police Power and that the Ordinance must bear a substantial relation to public health, safety, morals, comfort, convenience, or general good and welfare of the community. Mister Softee v. Mayor and Council of City of Hoboken, 186A. 2d. 573, 77 N.J. Super 354 (1962), Devine v. Mantua Township, Gloucester County, 100 A.

2d 563, 28 N.J. Super 299 (1953), BaBaris Lumber Co. v. Town of Secaucus in Hudson County, 80A. 2d. 130, 20 N.J. Super 586 (1952).

In Newark Theater Company versus City of Newark, Super, an ordinance condemning lewdness, obscenity, or indecency was upheld as not being vague and as not being unconstitutional as an improper use of police power, in violation of either the New Jersey or United States constitution and held that the ordinance prohibiting specific conduct was not obviously condemnable as violently contrary to good morals and decency. The Supreme Court recognized the right of a municipality to enact ordinances concerning obscenity as within the ambit of police authority, and as police power exercised in the public good.

The Defendants point to other activities as being permitted activities and contend that the Zoning Ordinance is discriminatory. They point to ordinances covering other coin operated amusement devices as being allowed such as massage parlors, bingo, raffles, and so forth. There apparently were specific ordinances dealing with these types of activities and these activities fall within the class of permitted uses. The permitted uses specifically refer to retail stores but then continues "such as but not limited to" and various types of retail activities are delineated. It is felt that these activities such as astrology machines referred to by the defendants are sufficiently permitted under the broad classification of permitted use, the same as an adult book store or coin operated peep shows, raffles, and bingo would appear to be a permitted use under the mandate of statutes of the State of New Jersey as incidental to activities by non-profit organizations.

Under the stipulation of facts the following was set forth.

6. The Judge will view the defendant's activities in question on the stipulation that what he sees is substantially similar to what he would have seen on the dates alleged in the pending Complaints.

It does not appear that the Municipal Court Judge viewed the defendant's activities and if the activities were continuing it would appear that there would be continuing violations. At any rate, this Court is not called upon to make a determination as to whether the activities of the nude dancers is an art and thereby protected constitutionally, or whether the activities would be lewd, obscene or immoral. In other words, this Court is not called upon to make a determination as to a distinction between bumps and grinds in the nude as compared to Swan Lake in the altogether. The concern in the present matter involves solely a zoning ordinance.

In view of the foregoing, it is determined that there has been no distinction without reason by the Municipality and that the permitted uses under the Zoning Ordinance is a reasonable exercise of police power and that the Zoning Ordinance is not directed to any infringement on the constitutionally protected rights. Live entertainment is simply not a permitted use in any establishment regardless to whether there is a relationship to nude entertainment. As stated in the case of Young versus American Mini Theaters, Inc., 427 U.S. 50, 96 S.Ct. 2440, 49 L. Ed. 2d 310 (1976) the United States Supreme Court upheld zoning of adult theaters and stated as follows: "the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances."

The Defendant also contends that since a Certificate of Occupancy was issued, they have a right to conduct live nude entertainment. But the issuance of a Certificate of Occupancy is only a certification that the premises may be used in accordance with the Zoning Ordinance. But does not give a license or privilege for uses which are not permitted by the Zoning Ordinance. And therefore, the Certificate of Occupancy would not permit live nude dancing, but would only permit uses in consonance with the Zoning Ordinance.

Opinion of Camden County Court

On Complaints number 393, 394, and 395 charging respectively the Defendants, Six Thirteen Corporation, James F. Schad, and Juliete Ann Di Luciano with using the premises at Six Thirteen Black Horse Pike, Mount Ephraim, New Jersey for live nude dancing is in violation of the Mount Ephraim Zoning Ordinance 99-15 B, the Defendants are hereby found guilty and the fine of $100 against each defendant is hereby imposed, for a total fine of $300.00, plus Municipal and County court costs.

C E R T I F I C A T E

I, JEAN M. PETRUZZI, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript to the best of my ability, of the above-captioned matter.

Dated: September 29, 1978

s/ Jean M. Petruzzi
CERTIFIED SHORTHAND
REPORTER

OPINION OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-905-78

BOROUGH OF MOUNT EPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Defendants-Appellants.

Argued October 9, 1979 — Decided October 17, 1979

Before Judges Bischoff and Botter.

On appeal from Camden County Court.

Lewis H. Robertson argued the cause for appellants (Levy and Robertson, attorneys).

Arnold N. Fishman argued the cause for respondent.

BY THE COURT.

The judgment entered in the Camden County Court dated October 30, 1978 is affirmed, essentially for the reasons expressed by Judge Neil F. Deighan, Jr. in his opinion of September 21, 1978.

A TRUE COPY
s/ Elizabeth McLaughlin
Clerk

ORDER OF CAMDEN COUNTY COURT ENTERING JUDGMENT OF CONVICTION

CAMDEN COUNTY COURT
CRIMINAL ACTION
APPEAL NO. 123-77

ARNOLD N. FISHMAN, P.C.
501 Cooper Street
Camden, NJ 08102
(609) 963-1888
Attorney for Plaintiff

BOROUGH OF MOUNT EPHRAIM,

Plaintiff,

vs.

JAMES F. SCHAD, DENNIS C. FAVEN, 613 CORP. and JULIETTE ANN DiLUCIANO,

Defendants.

THIS MATTER being opened to the Court by Levy & Robertson, Esquires, Lewis H. Robertson, Esquire, appearing, attorneys for defendants, and in the presence of Arnold N. Fishman, Esquire, Prosecutor for the Municipal Court of the Borough of Mount Ephraim, and the Court having considered the stipulations, memoranda, as well as the arguments of counsel, and good cause having been shown;

IT IS on this 30th day of October, 1978, ORDERED that the conviction of the defendant, Dennis C. Faven, for a violation of Ordinance number 99-2.j of the Ordinances of the Borough of Mount Ephraim be and the same is hereby reversed; and

IT IS further ORDERED that the convictions of the defendants, 613 Corp., James F. Schad, and Juliette Ann

Order of Camden County Court

DiLuciano, for violation of section 99-15B of the Zoning Ordinance of the Borough of Mount Ephraim be and the same is hereby affirmed, and each of the defendants are fined the amount of One Hundred ($100.00) Dollars, for a total of Three ($300.00) Hundred Dollars in fines, plus costs in both the Municipal and County Courts.

s/ Neil F. Deighan, Jr.
NEIL F. DEIGHAN, JR., J.C.C.

ORDER OF NEW JERSEY SUPREME COURT DENYING PETITION FOR CERTIFICATION

SUPREME COURT OF NEW JERSEY
C-373 SEPTEMBER TERM 1979

BOROUGH OF MOUNT EPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, et al.,

Defendants-Petitioners.

To the Appellate Division, Superior Court;

A petition for certification of the judgment in A-905-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 14th day of January, 1980.

s/ Stephen W. Townsend
Clerk

A TRUE COPY
s/ Stephen W. Townsend
Clerk

ORDER OF NEW JERSEY SUPREME COURT DISMISSING APPEAL

SUPREME COURT OF NEW JERSEY
16,581 SEPTEMBER TERM 1979

BOROUGH OF MOUNT EMPHRAIM,

Plaintiff-Respondent,

v.

JAMES F. SCHAD, et al.,

Defendant-Appellants.

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to *R.*2:12-9.

WITNESS, the Honorable Robert N. Wilenz, Chief Justice, at Trenton, this 14th day of January, 1980.

s/ Stephen W. Townsend
Clerk

A TRUE COPY
s/ Stephen W. Townsend
Clerk

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAMDEN COUNTY

APPEAL NO. 123-77

Criminal Action

Levy, Robertson and Herson, Esqs.
1319 Memorial Drive
Post Office Box 901
Asbury Park, New Jersey 07712
(201) 988-5683

BOROUGH OF MOUNT EPHRAIM,

Plaintiff,

vs.

JAMES F. SCHAD, DENNIS C. FAVEN, 613 CORPORATION and JULIETTE ANN DI LUCIANO,

Defendants.

I. Notice is hereby given that defendants James F. Schad, 613 Corporation and Juliette Ann Di Luciano, the Defendants-Appellants above named, hereby appeal to the Supreme Court of the United States from the Final Judgment of the Supreme Court of New Jersey entered in this action on January 18, 1980 denying their Petition for Certification and dismissing their appeal from the decision of the Superior Court of New Jersey, Appellate Division, decided on October 17, 1979 in which their conviction by the Camden Court entered on November 3, 1978 was affirmed.

Notice of Appeal

This appeal is taken pursuant to Title 28, United States Code Section 1257, subparagraph (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript all Complaints, Orders, Notices, Petitions, and other pleadings, briefs, memoranda, decisions and transcripted proceedings.

III. The following questions are presented by this appeal:

Whether a municipality may, without violation of the defendants' constitutional guarantees of free speech and due process, impose criminal penalties for the violation of its zoning ordinance which ordinance purports to proscribe all forms of live entertainment within the municipality's boundaries.

LEVY, ROBERTSON
& HERSON, ESQS.
Attorneys for James F. Schad, 613 Corporation and Juliette Ann Di Luciano-Defendants-Appellants

s/ Robert E. Levy
BY: ROBERT E. LEVY

PROOF OF SERVICE

I, Robert E. Levy, one of the attorneys for James F. Schad, 613 Corporation and Juliette Ann Di Luciano, appellant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of April, 1980, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the Borough of Mount Ephraim by causing a copy of the same to be placed in a regular depository for the United States Mail in a secure wrapper with

Notice of Appeal

First Class postage prepaid addressed to Arnold N. Fishman, Esq., Counsel of Record for the Borough of Mount Ephraim addressed to 501 Cooper Street, Camden, New Jersey 08102.

s/ Robert E. Levy
ROBERT E. LEVY